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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 524

CARTER MOUNTAIN TRANSMISSION CORP., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A12) is reported at 321 F.2d 359. The decision of the Federal Communications Commission (J. App. 150-163)[1] is reported at 32 F.C.C. 459.

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[1] "J. App." refers to the printed joint appendix filed in the court of appeals. Occasional references designated "R" are to the pages of the original record of the proceedings before the Commission.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on May 23, 1963 (Pet. A12). Rehearing *en banc* was denied on July 9, 1963. The petition for a writ of certiorari was filed on October 7, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Communications Commission denied a license for common carrier microwave radio facilities where the sole purpose of such facilities was to carry television signals to a community antenna television system, and where the probable result of a grant would have been the demise of the only television station in the area and the loss of its service to the public. The questions presented are:

1. Whether injury to the public in the form of a loss of local television broadcast service resulting from the competitive impact of a grant of radio facilities to a common carrier can properly be considered by the Commission in determining whether it is in the public interest to grant the common carrier application.

2. Whether the Commission's action constitutes an abridgement of free speech in violation of the First Amendment to the Constitution and Section 326 of the Communications Act of 1934.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution and of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, are set forth in the appendix to the petition (Pet. App. A13-A18).

STATEMENT

Petitioner Carter Mountain Transmission Corporation is a common carrier by radio licensed by the Federal Communications Commission (J. A. 150). Prior to 1958 Carter Mountain held an authorization from the Commission for microwave radio facilities on Copper Mountain, Wyoming, which it used to transmit television signals, picked up off-the-air on Copper Mountain, to community antenna television systems (CATVs) operated by Western Television Corporation in the towns of Riverton and Lander, Wyoming (J. A. 150-151, R. 8).[2] Western, then the sole customer of Carter Mountain, delivered the television signals to its subscribers by means of a system of wire cables (J. A. 127, 133-136). Because of the prohibitive cost of extending the cables to rural areas, Western's CATV service was available only to subscribers living in the towns (J. A. 159).

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[2] A community antenna television system consists of a receiving antenna and wire lines, together with the necessary amplifying equipment, through which the television signals received are transmitted to the television sets of subscribers. See *In the Matter of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting*, 26 F.C.C. 403, 407-408.

On April 24, 1958, Carter Mountain filed an application with the Commission for a construction permit to install an additional transmitter on Copper Mountain, to enable it to add a second channel to Western's CATV systems in Riverton and Lander, and to add a new two-channel service to a CATV operated by Western in Thermopolis, Wyoming (J. A. 150-151, R. 3-11, 405). Carter Mountain's application was granted without hearing in April 1959 (R. 405).

The licensee of television station KWRB-TV in Thermopolis, Wyoming (KWRB), filed a protest against the grant pursuant to former Section 309(c) of the Communications Act, 47 U.S.C. (1958 ed.) 309(c). KWRB, the only television station in sparsely settled northwest Wyoming, serves the towns of Thermopolis, Riverton and Lander, and provides the only television service available in the surrounding rural areas (J. A. 158, 128-133). The protest alleged that the grant of improved facilities to Carter Mountain would strengthen the competitive position of Western's CATVs to the extent that KWRB would be forced to discontinue service to the public (R. 40-51).

The Commission stayed the effectiveness of the grant to Carter Mountain (R. 97-102) and designated the matter for hearing on the following issues *inter alia* (R. 174-175):

> To determine the areas and populations now served by Station KWRB-TV, Thermopolis, Wyoming, and the nature and type of service provided by said station.

To determine what impact a grant of the aforesaid application will have upon the operation of Station KWRB-TV, Thermopolis, Wyoming, and the resulting injury, if any, to the public now served thereby.

To determine, in light of evidence adduced and determinations made, whether a grant of the aforesaid application will serve the public interest, convenience, or necessity.

After a hearing, the examiner issued an initial decision proposing to deny the protest and affirm the grant to Carter Mountain (J.A. 127-149, R. 405-433). He ruled that whatever impact the grant might have upon the local television station was of no legal significance (J.A. 146-149).

Upon the filing of exceptions to the initial decision, the Commission denied Carter Mountain's application, holding that authorization of the new facilities would not serve the public interest (J.A. 150-163). The Commission found that the improvement in Western's CATV service and competitive position vis-à-vis station KWRB resulting from a grant of additional facilities to Carter Mountain would probably cause the demise of the local station and the loss of its service to the public (J.A. 153-158). In that event, local programs would be available to persons within its service area, persons living in rural areas not served by the CATV cables would have no television service, and persons living in the towns would be deprived of free television service and would have CATV service only if they subscribed and paid for it (J.A. 156, 159). The Commission concluded that the

need for the local station and its service to rural areas outweighed the need for the improved CATV service (J.A. 159).

The Commission's order granted Carter Mountain leave to refile its application when it could show that the CATVs would carry the signal of KWRB and not duplicate the latter's network programming (J.A. 160).[3]

The court of appeals affirmed (Pet. A1-A12). Rejecting petitioner's contention that the Commission was limited to such classic common carrier criteria as demand for service, efficiency, etc., the court upheld the Commission's authority under the Communications Act to consider the effect of a proposed common carrier use of radio upon other uses of radio licensed by the Commission (Pet. A3-A6). The court stated (Pet. A6) that the Commission may properly consider the "end use" of common carrier facilities by a CATV in determining the public interest, citing *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1. The court of appeals also rejected petitioner's contentions that the Commission's action unlawfully denied Western access to its proposed facilities and infringed Western's First Amendment rights. Pointing out that Western's right of access was dependent upon whether petitioner first obtained a license from the Commission (Pet. A6), the court ruled that under the Communications Act "a denial of a station license, validly made because

[3] By a Memorandum Opinion and Order issued on May 24, 1962, the Commission denied reconsideration (R. 733-736).

the standard of 'public interest, convenience, or necessity' has not been met, is not a denial of free speech. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27" (Pet. A7-A9).

ARGUMENT

1. The primary question in this case is whether the Communications Act authorizes the Commission, in ruling upon an application for a common carrier radio license, to consider the competitive impact which the proposed carrier service would have upon the public's enjoyment of existing broadcast facilities. It seems clear that the Commission, charged by the Act with regulation of common carrier and broadcast services in the public interest, properly held that it may weigh the impact of a grant in one service upon existing facilities in another. Petitioner's argument to the contrary (Pet. 14-20) would negate the purpose of the Communications Act to achieve a comprehensive and coordinated regulation of all interstate communication by wire and radio through the Commission and to insure the "maximum benefits of radio to all the people of the United States." Sections 1, 307 (b) of the Communications Act, 47 U.S.C. 151, 307 (b); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 210-217; *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 279, 285.

A common carrier cannot construct a new facility or extend its existing facilities *sua sponte* or upon customer demand. The Communications Act gives the Commission jurisdiction of "every common car-

rier engaged in interstate or foreign communication by wire or radio," 47 U.S.C. 201, and this jurisdiction goes to the extension and acquisition of new radio or wire lines, which can only be constructed where required by the "public convenience and necessity," 47 U.S.C. 214. Furthermore, the Act requires a license for all uses of radio, including its use for common carrier purposes, which can be obtained only upon a showing that the "public interest, convenience, and necessity" will be served 47 U.S.C. 301, 307-310. It is settled that, in passing upon an application for a new broadcast authorization, the Commission may properly consider a resulting loss of existing broadcast service as a factor bearing upon the public interest. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475-476; *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 258 F. 2d 440, 443-444 (C.A. D.C.). Similarly, in the common carrier field, the competitive impact of a proposed facility upon existing common carrier service has been held to be a "relevant factor in weighing the public interest." *Federal Communications Commission* v. *R.C.A. Communications, Inc.*, 346 U.S. 86, 94.

Under the circumstances, it was clearly proper for the Commission to consider the effect of the proposed common carrier operation upon the existing broadcast service of KWRB. The relation of the two services is immediate and direct. Petitioner proposed to pick up off the air signals broadcast by television stations in other areas, transmit them by microwave to CATV systems in the area served by KWRB, and

thus to deliver in practical effect competing television material. As the court of appeals properly recognized (Pet. App. A4) the "Commission is charged with the duty of regulating not only common carriers by radio but broadcasters of television programs. It cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field."[4]

2. The fact that the Communications Act provides no specific grant of authority over community antenna systems does not preclude the Commission action here involved. Petitioner's argument (Pet. 18-19) that the Commission exceeded its authority when it considered the use to be made of the proposed common carrier service cannot be distinguished in substance from the position unsuccessfully urged by the carrier in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1. In *Transcontinental* this Court sustained the authority of the Federal Power Commission to deny a certificate for the transportation of natural gas where the proposed end use—burning the gas under the purchaser's industrial boilers—was deemed inferior to other possible

[4] Petitioner's proposed use of radio would be destructive of the Commission's pattern of allocation of television stations to the various communities of the United States. See *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24 (C.A. D.C.). If the Commission were required to grant licenses for common carrier uses of radio without regard to the impact on the television allocation plan, it could not carry out the statutory mandate of Section 307(b), 47 U.S.C. 307(b), to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

uses, although the Power Commission had no jurisdiction over direct sales for use by the purchaser. The authority of the Communications Commission to consider the proposed "end use" here would thus appear to be clearly established since, unlike the Natural Gas Act of 1938 (see 365 U.S. at 8, 19), the Communications Act is intended to provide a comprehensive scheme of federal regulation of interstate communications. See Section 1, 47 U.S.C. 151. Community antenna television systems present an "end use" peculiarly related to television broadcasting. *Clarksburg Publishing Co. v. Federal Communications Commission*, 225 F. 2d 511, 517 (C.A. D.C.).

The fact that the Commission in 1959, as part of its general inquiry into *CATV and TV Repeater Services*, 26 FCC 403, 431-433, concluded that it lacked the authority exercised here should pose no problem. This general inquiry was concluded prior to the Court's decision in *Transcontinental Gas*. Further, there is here no long-standing and consistent disclaimer of authority by the agency entrusted with the administration of the statute. Nor has there been any legislative enactment or reenactment which could be said to reflect Congressional acquiescence. While several bills have been introduced in Congress to give the Commission direct authority over CATVs,[*] a question not involved here, there is no warrant in this legislative history for a finding that the Commission's present view of the statute is erroneous.

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[*] See, *e.g.*, S. 1739, S. 1741, S. 1801, S. 1886, S. 2303 and S. 2653, 86th Cong., 1st Sess.

3. The court of appeals properly rejected petitioner's contention (Pet. 8-13) that its customer, Western, had a legal right under the Communications Act and the First Amendment to demand and receive the service for which petitioner sought a license (Pet. A8, A5-A6). First of all, as the court of appeals noted (Pet. A8), Western was not before it. In any event, however, contrary to petitioner's argument, the fact that a member of the public has a right to non-discriminatory service from an existing common carrier does not establish that where existing carriers do not offer a desired service the Commission must grant a license to a carrier proposing to provide that service.[*]

It has long been settled by this Court's decision in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-227, that the constitutional "right of free speech does not include * * * the right to use the facilities of radio without a license" and that a denial of license, upon a valid determination that the public interest standard has not been met, is not a denial of free speech. Petitioner's attempt (Pet. 11-12) to distinguish the *National Broadcasting Com-*

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[*] Contrary to petitioner's repeated suggestion (Pet. 9, 13, 16-17), this case does not present any question as to the propriety of a denial of license to a common carrier serving the public in general because its many customers may include competitors of broadcast stations, or as to the validity of a grant conditioned upon a discriminatory denial of service otherwise available to the public. Since the facilities here were for the sole use of Western's CATVs, the court of appeals had no occasion to consider factually different situations.

pany case on the ground that the public has a legal right to demand access to a common carrier service, but no right of access to a broadcasting station, rests on its basic and unsupported premise that the demand of one potential customer, and not the public interest, is the sole governing consideration before the Commission when it passes on the application of a common carrier to use radio. As we have shown above, the effect of a proposed common carrier service upon an existing broadcast service is a proper matter for consideration by the Commission. Its consideration here did not constitute a denial of any right of free speech.[8]

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[8] Petitioner's contention (Pet. 10-11) that the Commission's statement of the conditions prerequisite to any grant of the proposed service constituted an attempt to censor the intelligence to be transmitted over its facilities is not well taken. The conditions were reasonably designed to avoid the threatened damage to the local station and the public interest, and hence do "not amount to 'censorship' within the meaning of Section 326" of the Communications Act, 47 U.S.C. 326 (Pet. A8-A9). See *Bay State Beacon* v. *Federal Communications Commission*, 171 F. 2d 826 (C.A.D.C.); *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. 2d 670 (C.A.D.C.). While the conditions would require the CATVs to carry the programs of KWRB and not to duplicate those programs on competing channels, they would not deny any programs to the viewing public.

CONCLUSION

The petition for a writ of certiorari should be denied.

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